

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

- - - - -X
UNITED STATES OF AMERICA, :
 :
Plaintiff, : Criminal No. 4:15-103
 :
vs. :
 :
JESSE R. BENTON, : TRANSCRIPT OF HEARING
JOHN FREDERICK TATE, and : (Motion to Sever)
DIMITRIOS N. KESARI, :
 :
Defendants. :
- - - - -X

Second Floor Courtroom
United States Courthouse
123 East Walnut Street
Des Moines, Iowa 50309
Thursday, February 4, 2016
8:58 a.m.

BEFORE: THE HONORABLE HELEN C. ADAMS, Magistrate Judge.

Terri L. Martin, CSR, RPR, CRR
United States Court Reporter
Room 189, U.S. Courthouse
123 East Walnut Street
Des Moines, Iowa 50309

1 discuss that at the end of the hearing; but my request is that
2 not be filed on the public record. It is subject to a
3 protective agreement, and so I think the 302 itself should not
4 be filed on the public record, although I do intend to use it
5 throughout the course of this hearing.

6 May I pass these documents up?

7 THE COURT: Yes, you may.

8 (Counsel conferring.)

9 MR. COONEY: The interview itself was in January of
10 2014.

11 MR. BINNALL: And, Your Honor, just for the record, we
12 do object to any use of the 302, the notes of the officer,
13 pursuant to the terms of the proffer agreement at this point.

14 THE COURT: So if I'm understanding you correct,
15 you're objecting to it because it violates the proffer
16 agreement?

17 MR. BINNALL: Yes, Your Honor.

18 MR. COONEY: So I'll start with that issue if I may,
19 Your Honor.

20 Well, actually if I could just go forward with my
21 argument, I'm happy to address that when I reach the point that
22 I would like to use information from that 302 if that's all
23 right.

24 THE COURT: That's fine. I'll just hang on to it for
25 now and we'll make a determination what we're going to do with

1 subsequent filing periods.

2 THE COURT: Yeah, I understand.

3 MR. COONEY: All right.

4 THE COURT: You're just telling me so I understand
5 some of the timing issues of the evidence.

6 MR. COONEY: Yes, that's exactly right.

7 THE COURT: All right.

8 MR. COONEY: So right now it's -- whether they've
9 figured out how they're going to make payments to ICT, how
10 they're going to route them and whatnot, that's not really part
11 of the case as terms of the evidence; but what is clear from
12 this is we don't want anything showing up on FEC reports about
13 Kent Sorenson. That can't happen.

14 So with that context then, I want to turn now to the
15 proffer that Kent -- or excuse me; the proffer that defendant
16 Kesari made on January 9, 2014 to the government. So I think on
17 that the first thing I'll address is Mr. Binnall's objection to
18 the use of that proffer agreement on the basis that it is in
19 violation of the proffer agreement.

20 I hand up the proffer agreement as Government's
21 Exhibit A. What I would simply point out about the government's
22 proffer agreement with Mr. Binnall is first and I think
23 principally and most importantly is an agreement between
24 Mr. Binnall that we will not use any statements that he made
25 during the proffer session in our case in chief in a criminal

1 prosecution against him. I'm not introducing or attempting to
2 use any of these proffer statements today against him. I'm
3 using these proffer statements in opposition to defendant Tate's
4 severance motion. Regardless of whether Kesari was here at the
5 table today, Kesari was in the case, that would be a permissible
6 use of these proffer statements.

7 Second, and most importantly, the instances in a
8 trial -- and this is a pretrial hearing; but the instances in
9 this trial in which the government could utilize proffer
10 statements are when Kesari himself testified and said something
11 inconsistent with what he said at the proffer or if they
12 presented evidence inconsistent with his proffer statements.

13 The way which I'm using these statements today I think
14 strikes right at the heart of the permissible purpose of them,
15 which is to contradict. He's now saying that I'll testify that
16 we didn't have any conversations about what the \$25,000 was for,
17 that there was no agreement with Sorenson until January 2012.
18 He makes inconsistent statements on these subjects, statements
19 inconsistent with those claims during his January 9, 2014
20 proffer.

21 So before I -- I don't know if Your Honor wants to
22 hear arguments from Mr. Binnall or not before I start to move in
23 to explain the statements, but --

24 MR. BINNALL: I would like to be heard, Your Honor.

25 THE COURT: Why don't you come up here, Mr. Binnall,

1 so we can make sure we can hear you for your record.

2 MR. BINNALL: Yes, Your Honor.

3 THE COURT: Thank you.

4 MR. BINNALL: Your Honor, this is the same proffer
5 agreement with a different party that the government has already
6 had its case against Mr. Kesari's two co-defendants thrown out
7 and dismissed because of the government's misconduct in
8 violation of their proffer agreements, and now they're trying to
9 do the same thing with Mr. Kesari.

10 The idea that it's limited to only being brought --
11 their particular argument regarding that the timing has already
12 been rejected by Judge Jarvey who found that the use of the
13 statements in grand jury was a violation of the proffer
14 agreement. And on top of that, Your Honor, Mr. Kesari is still
15 a part of this case.

16 If the government wants to agree to the severance now
17 and then only use it in regards to the severed case with
18 Mr. Tate, that would be fine; but as of right now, the case is
19 not severed, and so it still is being put in for all purposes
20 against Mr. Kesari, and paragraph 5 of the proffer agreement
21 specifically says that if they are offered, it will be at trial
22 or sentencing, not at a pretrial motion.

23 It is the government who drafted this language. They
24 are strictly held to the proffer agreement, and they should not
25 be able to breach it as they did Mr. Kesari's co-defendants

1 previously.

2 THE COURT: I'm going to at this point just accept the
3 exhibits subject to the objections so we can go ahead with
4 today's arguments, and then I'll make a ruling as part of the
5 ultimate ruling on the motion to sever with respect to the usage
6 of those.

7 MR. COONEY: May I reply on one point on that?

8 THE COURT: You may.

9 MR. COONEY: It is correct that Judge Jarvey dismissed
10 counts in this case because of the government's use of proffered
11 statements before the grand jury, and the gravamen of that
12 opinion was that the government should not have used statements,
13 proffered statements used -- or made by Mr. Tate against him in
14 the grand jury, that we should not have used statements that
15 Mr. Benton proffered to against him in the grand jury. That was
16 the gravamen, the direct use against those individual
17 defendants. The gravamen of that opinion was not Mr. Kesari's
18 proffered statements, for example, could not be used against
19 Mr. Tate in the grand jury or could not be used against
20 Mr. Benton in the grand jury.

21 So I think, first of all, use in the grand jury is
22 significantly different than use in a severance hearing; but I
23 go back to specifically, you know, where I started. These are
24 being used to defeat a severance motion by defendant Tate, not
25 by defendant Kesari, and they're not being used as substantive

1 evidence. They're being used much differently in this hearing
2 to rebut claims about what Kesari might testify to. Paragraph 5
3 of the government's proffer agreement simply references
4 substantive evidence.

5 So going forward then with the statements, the first
6 thing that I would like to draw the court's attention to -- you
7 know what, Mr. Binnall could I trade you? I don't have a full
8 size copy.

9 MR. BINNALL: No, that's fine.

10 MR. COONEY: Thank you. I appreciate that.

11 I'm actually going to move to the last slide. This is
12 Government's Exhibit C for the record. And I just want to point
13 out some things that defendant Kesari did not say during his
14 proffer, significant omissions which undercut this and I think
15 will be filled in when I show Your Honor what he did say during
16 the proffer; but Kesari never said that Tate did not know that
17 the campaign agreed to pay Sorenson for his endorsement, never
18 made that claim during his proffer.

19 He did not say that he and/or Jesse Benton hid
20 information from Tate about the Sorenson payments from Tate or
21 that he ever lied to him about it.

22 Kesari did not say that Tate ever objected to paying
23 Sorenson, either in December 2011 or after the June 25, 2011
24 e-mail exchange where within one minute of Kesari's
25 clarification about ICT Tate approved the payment. And while

1 I'll get to that June 25, 2011 e-mail, I kind of want to set the
2 stage. Those are things that were not said during the proffer.
3 And now I want to show Your Honor some of the things that were
4 said.

5 If you go to page, I believe it's page 2, Kesari's
6 statements inconsistent with Tate not knowing about the December
7 Sorenson deal. And I have a mistake on here, Your Honor. I
8 apologize. I say quotations from the FBI 302 of March 26, 2014
9 interview. It was January 9, 2014 interview. The report was
10 written on March 26th. But if you turn to page 4 of the 302, so
11 what I'm putting up on these slides are just quotes from the
12 302, the 302 reads: Kesari did most of the negotiation as he
13 was the middleman -- "middleman" was his word; that's why it's
14 in quotations there -- for the Ron Paul for President Campaign
15 senior management. He said, Tate did not see the value Sorenson
16 could bring to the Ron Paul Campaign. Benton wanted Sorenson's
17 support because we all thought any bit would help.

18 And then importantly, Ron Paul was not aware of any of
19 the details regarding Sorenson joining his campaign as he had
20 nothing to do with the day-to-day operations and staff members.

21 So what Kesari tells the FBI is, look, I did the
22 negotiating as the middleman, Tate not as on board, didn't think
23 it was that important. Benton thought it was more important.
24 Ron Paul did not know any of the details. He did not know any
25 of the details. What Kesari doesn't say importantly is that

1 Tate doesn't know details or Benton doesn't know details. It's
2 Ron Paul that doesn't know the details. Kesari is doing the
3 negotiation as the middleman between him, Sorenson, and the Ron
4 Paul Campaign senior manager.

5 If you turn to the next page, this is on page -- we'll
6 start with page 7 of the 302. This is Kesari. Quote: The
7 deal -- and deal is in quotes. That's because it was his word.
8 Of course, the 302 is a summary of his interview prepared by
9 Special Agent LoStracco, but deal is his word. The deal of
10 12/26/2011 -- that's the \$25,000 check -- and 12/29/2011 --
11 that's pull the wire; i.e., we'll make the payments later on --
12 was understood. Kesari and his team already knew and agreed on
13 Sorenson's terms.

14 That is wholly inconsistent with his claim, one, that
15 he never discussed this with Tate, but it's also wholly
16 inconsistent, two, with his proposed testimony now that there's
17 no deal reached with Sorenson until January of 2012.
18 Specifically in his proffer he states, the deal of 12/26 and
19 12/29, 2011 was understood.

20 Page 9, Kesari states, Drew Ivers, the Ron Paul
21 Presidential Campaign Committee Iowa co-chair and other
22 co-chairs were aware Sorenson was joining the Ron Paul Campaign.
23 They just knew he was joining the campaign but did not know any
24 details regarding it.

25 The reason why this is so important, Your Honor, is

1 that it goes to the omission, the impeachment by omission of
2 Kesari's now claim that he never had conversations about this
3 subject with John Tate. Nowhere in his proffer on January 9,
4 2014, did he ever make that claim; but he made very specific
5 claims about who did not know that information. For example,
6 Drew Ivers. For example, Ron Paul. And that proffer, Your
7 Honor, was a proffer that extended more than four hours. It's a
8 14-page 302. That was not a 30-minute interview. It was
9 extensive and topics were covered repeatedly if you look at the
10 302 and cover from beginning to end. And on more than one
11 occasion, as memorialized in that 302, defendant Kesari was
12 explicitly provided the opportunity to change anything he said,
13 make additions, amend anything, what have you, did not take that
14 opportunity, never made a claim that Tate was not in the know.

15 And then page 11 -- I think this is important, and
16 this is consistent with the e-mail traffic -- he says, mostly,
17 mostly, Kesari, Benton, and Sorenson discussed Sorenson joining
18 the Ron Paul for President Campaign. And e-mail traffic is I
19 think generally consistent with that, mostly Kesari, Benton, and
20 Sorenson.

21 But that's not only those people. That's not John
22 Tate didn't know. That's not John Tate wasn't involved. And
23 that's so important in the context of other explicit statements
24 during that interview, during that proffer session about who is
25 in the know and who was not in the know.

1 All right. I want to move now kind of categorically
2 to the second big picture claim by the Benton camp -- excuse me,
3 by the Tate camp about what Kesari's testimony would show, that
4 John Tate was not involved in or even aware of subsequent plans
5 or agreements or any details thereof for the Ron Paul Campaign
6 to pay Kent Sorenson and the claim that there was no
7 conversation about what ICT was in that January 2012 period up
8 until June 25, 2012.

9 So, first, let's start with something that Kesari
10 said, so I'll go back to the PowerPoint. For the record, that's
11 Government's Exhibit C.

12 And I have to admit, I apologize, I've lost track of
13 what page I am on the PowerPoint. I think there's only seven
14 pages on the PowerPoint, so this is probably about page 5, but
15 it's from page 10 of the Kesari proffer. Kesari states, Kesari
16 did not know how much Tate knew about Sorenson's invoices since
17 Kesari was talking to Benton about this matter.

18 That is an inconsistent statement with the claim that
19 he didn't know because I never told him. Defendant Kesari can't
20 come in and testify as to what Tate knew and when he knew it
21 when he makes a statement on another date, Kesari did not know
22 how much Tate knew about Sorenson's invoices since Kesari was
23 talking to Benton about this matter.

24 But here is what we do know about February 7, about
25 that time period, February 7, 2012. Government's Exhibit 74,

1 and this is one that defendant Tate attempts to rely on in
2 support of the statements.

3 On February 7, 2012, Government's Exhibit 74, Kesari
4 e-mails Tate, did Jesse get Kent paid? He said he would handle
5 it and Kent is texting me today.

6 John Tate responds, no idea. Ask him.

7 If defendant Kesari never spoke with John Tate about
8 paying Kent Sorenson, about a deal, a payment in return for his
9 endorsement, that the campaign was paying him anything at all,
10 what is he doing in February 2012 sending an e-mail to Tate
11 asking him if Jesse had gotten Sorenson paid? If Tate is not in
12 the know, there's no reason for Tate to send an e-mail to him.
13 That is inconsistent with what he is proffering today he would
14 testify to in a trial.

15 Subsequent to that e-mail, Government's Exhibit 84a,
16 John Tate approves an invoice for a payment to ICT on April 3,
17 2012.

18 On May 29, 2012, Government's Exhibit 95 -- and I can
19 put these up for Your Honor, but they do not discuss what ICT
20 is. These are simply just memorializing for the record that
21 he's approving payments in the spring of 2012. Government's
22 Exhibit 95 --

23 THE COURT: Just a second.

24 Mr. Warrington?

25 MR. WARRINGTON: Your Honor, I think it would be

1 helpful to put them up since they don't discuss ICT.

2 THE COURT: If you've got them available, why don't
3 you put them up.

4 MR. COONEY: Sure. That's right, they don't, they
5 don't. So let me put another one up, Government's Exhibit 59.

6 THE COURT: 59?

7 MR. COONEY: Yes, ma'am.

8 THE COURT: Okay.

9 MR. COONEY: An e-mail from Fernando Cortez to Tate
10 and Benton, and a reminder, kind of setting the stage here about
11 who is who in the campaign; but Tate and Benton are, in terms of
12 their role in the campaign, senior to Dimitri Kesari and are the
13 two most senior people in the Ron Paul Presidential Campaign.
14 So Cortez on February 22, 2012 sends an e-mail to Tate and
15 Benton and he says -- attaches a spreadsheet -- here is the full
16 breakdown of the expenses since January 1, 2012.

17 The spreadsheet attached -- let's see if you can see
18 that -- down here (indicating) contains a February 8, 2012
19 check, Interactive Communication Technologies, ICT, \$38,125,
20 making it the most significant expense in that category and on
21 this spreadsheet the third highest expense on the spreadsheet.

22 MR. WARRINGTON: Your Honor --

23 THE COURT: Yes.

24 MR. WARRINGTON: -- I hate to do this, but they're
25 showing one page of a spreadsheet that was rather large, and

1 they have no evidence or inference for taking this to open up
2 the Excel spreadsheet. They're just slinging things together.

3 THE COURT: Go ahead, Mr. Cooney.

4 MR. COONEY: Thank you.

5 All right. So here's the point, Your Honor, he gets
6 an e-mail, shows that ICT is on there. Subsequent to receiving
7 that spreadsheet, John Tate, one of the senior most officials
8 responsible for approving payments, approves invoices on
9 April 3, 2012, on May 29, 2012 for payments to ICT.

10 Why is John Tate explicitly approving significant
11 payments if he does not know what those payments are for? And
12 I'll show them Government's Exhibit 84a -- I'm sorry, that's in
13 the other binder.

14 Actually I'll use Government's Exhibit 84b. This says
15 simply, attached is the invoice for services rendered in
16 February. Let me know if you need anything else.

17 That is an e-mail from Sonny Izon to Dimitri Kesari.
18 Kesari passes it on to Cortez saying, approved by Jesse. Cortez
19 checks with Tate. Tate says approved. It's a payment to ICT.
20 There's no discussion in the e-mail about what ICT is, no
21 discussion in there because John Tate doesn't need any
22 discussion of that.

23 Government's Exhibit 95, same situation involving a
24 wire. There is a request for a wire payment to ICT for \$8,850.
25 Cortez forwards it on to Tate: Approved? Dimitri said it is

1 the last one.

2 Tate: Approved.

3 So this is the setup now for June 25, 2012.

4 Let's start with Government's Exhibit 102, same
5 situation. Bottom e-mail, June 25, 2012, e-mail from a member
6 of the campaign, one of Cortez's employees, requesting an \$8,850
7 wire to ICT. Cortez e-mails Tate: According to Dimitri this is
8 the last one (again). Approved? 8 thousand. And this is the
9 e-mail that Tate sends to Kesari: What is this? What is it
10 for, who is it? Why do we keep paying them? The last payment
11 was supposedly the last.

12 6:22 p.m.: This the last payment for Kent Sorenson.
13 The deal Jesse agreed to with Kent.

14 That's not, let me explain to you exactly what ICT is.
15 That's a reminder, this is the deal that Jesse made with Kent.
16 This money is for Kent Sorenson. That's at 6:22.

17 Government's Exhibit 103, same e-mail chain. Now,
18 Kesari at 6:23 sends another e-mail in response -- there's no
19 response yet from Tate, but he sends an additional e-mail in
20 response to the original question by Tate about what this was.
21 6:23: It was for 6 months, it was for 6 months.

22 One minute later, a minute later: Okay. Thanks.

23 Not more clarification needed. Okay. Thanks. So he
24 has two e-mails. It's money for Kent Sorenson and it was for
25 six months. Okay. Thanks.

1 Government's Exhibit 104, doesn't even take a minute,
2 John Tate to Fernando Cortez: Approved.

3 Defendant Tate is correct about Government's Exhibit
4 102. We got that e-mail from the computer of Dimitri Kesari.
5 We didn't get it from the Ron Paul server. We didn't get it
6 from John Tate's e-mail. Their claim is that there's no
7 evidence he ever saw it. That evidence is consistent with that
8 e-mail, an e-mail identifying exactly what ICT is for, that it's
9 a passthrough for Kent Sorenson. That is consistent with John
10 Tate deleting that e-mail.

11 The government has provided in discovery and called a
12 witness at trial to testify regarding this and will likely call
13 a witness to testify at trial again; but the Ron Paul server
14 uploads from individuals' computers who are using them on a
15 regular basis and it updates. An individual that has a hard
16 drive and then stops using a computer, for example, does not
17 upload to the server, a local copy of the e-mail may be retained
18 in that person's computer; but when it's deleted from someone
19 else's computer who does roll up to the server, it may be gone
20 from the server. If it's deleted from another device like a
21 Blackberry or an iPhone, it can be deleted.

22 That, Tate's argument, that's inconsistent. Again
23 with that e-mail existing or him even seeing the e-mail about
24 what ICT is for, that e-mail is at least, at least equally
25 consistent with that e-mail being deleted.

1 And then, finally, Your Honor, what I would like to
2 turn to in terms of discussing the evidence is there is now,
3 which was not in the original moving papers but is a component
4 of the proffer about what Kesari will testify to, that Sorenson
5 told me that this is what they did in the Bachmann Campaign and
6 the Bachmann lawyers said that was okay. Again, that
7 information never comes up in his proffer.

8 And I don't have a PowerPoint slide prepared on this
9 one, but I'll just point out for Your Honor where in the 302, in
10 Government's Exhibit B, I think there are pertinent statements.

11 First at page 2, just to kind of set up, Kesari says,
12 I presumed he reported to Guy. That's Guy Short. That is an
13 individual who consulted for the Bachmann Campaign. Kesari knew
14 Sorenson was paid by C & M, Short's company, but did not know
15 when and how he came about receiving compensation from C & M.

16 So the background here is Guy Short has a political
17 consulting firm, works for the Bachmann Campaign. Bachmann
18 Campaign pays Short's company, C & M. And it was Kesari's
19 understanding that Sorenson reported to Guy Short and so Guy
20 Short paid Sorenson.

21 He says, I didn't know when and how he came about
22 receiving compensation from C & M. I don't know details.

23 Page 3 of Kesari's proffer, that's Government Exhibit
24 B.

25 Kesari did not think he ever had a conversation with

1 Sorenson regarding the Federal Election Commission, FEC. Kesari
2 stated -- and this part now is a quote from Agent LoStracco that
3 she put in the 302 -- none of us thought, hey, how are we going
4 to get around FEC disclosures or reports? However, there were
5 conversations about the general public finding out Sorenson was
6 getting paid by the campaign. Sorenson did not want to violate
7 the Iowa State ethics rules.

8 That is not a conversation of endorsement from the
9 Bachmann people, that he had conversations with the Bachmann
10 lawyers that this would be fine to do this on the FEC. In fact,
11 he's saying we never discussed the FEC.

12 And then, finally, in his proffer he was asked
13 questions about whether he reached out for legal advice to the
14 Ron Paul Campaign. And Kesari says, "Kesari did not ask
15 Warrenton" -- that is a misspelling. That's with reference, I
16 think, to Mr. Warrington who at the time was a lawyer for the
17 Paul Campaign -- "for advice regarding Sorenson joining the
18 RPPCC. Kesari stated: 'I would say I just told him about
19 bringing him [Sorenson] to the campaign.'"

20 And the point is this: Nowhere in his proffer does he
21 make the claim that Sorenson told him that Bachmann's lawyers
22 said that this would be fine. In fact, his statements are
23 inconsistent with that. And he acknowledges he reached out to
24 his own lawyers. He didn't seek legal advice or anything like
25 that; but it simply makes no sense whatsoever that he would have

1 done this on the authority of Bachmann's lawyers when he clearly
2 was in contact with the Paul Campaign lawyers but elected to ask
3 nothing about it.

4 So what's the point of all of this, Your Honor? As we
5 set forth in our pleading papers, there is a very strong
6 presumption in the law for a joint trial. Defendant Tate bears
7 a very high burden to overcome that. It is all based on
8 Kesari's testimony, not a long explanation of all of the
9 evidence in the case, and we both know that. We've traded barbs
10 about what these e-mails mean and what they don't mean, and
11 that's exactly what we're going to do in this trial; but not a
12 single thing to the extent there have been specific proffers by
13 defendant Kesari about what he might say when there wasn't a
14 deal until January of 2012, I never spoke about it with Tate, I
15 didn't tell him about ICT. All these things do is merely an
16 effort to impeach otherwise incontrovertible documents, and
17 defendant's own statements, lengthy statements to the government
18 are littered with inconsistencies.

19 On that record he can't establish that defendant
20 Kesari's testimony, that him appearing in trial would be
21 substantially exculpatory to defendant Tate. And, moreover,
22 they expose exactly what this is.

23 Based on all of the inconsistencies that I've just set
24 forth, defendant Kesari is not showing up to testify in a trial.
25 This is an effort to overcome the strong presumption in favor of

1 a joint trial. It is an effort to simply obtain a severance of
2 this case, not to secure his testimony.

3 And, finally, I'll end in the same place that
4 defendant Tate did, which is, with respect to whether the
5 government was on notice and things like that, that's not my
6 point. My point is this allegedly substantially groundbreaking
7 exculpatory testimony that defendant Kesari apparently wants to
8 provide for defendant Tate, the first time we ever hear he wants
9 to testify is the motion in this trial, not a motion before the
10 last trial when defendant Tate was a defendant all the way up
11 until the Friday before that trial was to begin, the first time
12 we ever hear defendant Kesari raise his hand and say, "I want to
13 come and testify," or defendant Tate raises his hand to say, "I
14 want to use Kesari as a witness" is after Kesari has already
15 gone through a trial one time, not on the eve of the first time
16 this trial began.

17 I think that helps here. That is telling as to
18 whether this is substantially exculpatory or whether this is a
19 strategic point to obtain a severance.

20 Unless Your Honor has any questions --

21 THE COURT: Just one.

22 MR. COONEY: Yes.

23 THE COURT: With respect to the exhibits that you gave
24 me, I would say that Exhibit C is not really an exhibit. It's
25 more of a -- I mean, it's your argument.

1 MR. COONEY: No; I agree, and that's fine.

2 THE COURT: All right.

3 MR. COONEY: It cites the pages in the 302. I
4 completely agree, it should not be in evidence. It is a
5 demonstrative, that is right.

6 THE COURT: All right. So I'm just going to keep it a
7 demonstrative exhibit similar to what I have with respect to the
8 PowerPoint presentation that defense counsel provided to me.
9 And as I indicated then, with respect to A and B, I'm accepting
10 those at this time subject to the objections until I have a
11 further opportunity to review that.

12 (Government Exhibits A and B
13 were received in evidence.)

14 THE COURT: Thank you.

15 MR. COONEY: Thank you.

16 And, Your Honor, I failed to mention one thing, that I
17 would encourage Your Honor to look at the Jackson case that
18 Mr. -- that defendant Kesari cited today, which I don't think is
19 in his moving papers; but there the district court's decision to
20 not grant a severance was affirmed, and I don't believe there
21 was any discussion about placing conditions on a proffer. That
22 issue never really came up during this hearing today, I suppose,
23 but even the district court's decision to deny severance was
24 actually affirmed in that case.

25 The entire paragraph in the Jackson case is one

1 paragraph.

2 THE COURT: Thank you.

3 All right. Mr. Warrington, can you give me just a
4 second?

5 Mr. Dickey.

6 MR. DICKEY: Yes. Thank you, Your Honor.

7 We take no position on the motion. However, I would
8 note that if the court does grant the motion, we would like an
9 opportunity to be heard with respect to with which co-defendant
10 our case would be tried. I think there's some important issues
11 with respect to the speedy trial.

12 THE COURT: Okay. Thank you, Mr. Dickey.

13 All right. Mr. Warrington, you can respond.

14 MR. WARRINGTON: No computer this time, Your Honor.

15 Let me first address the standard here because I think
16 a lot of what the government -- a lot of what the government
17 spent its time on had nothing to do with the standard in this
18 case. We have to satisfy the burden that Mr. Kesari is likely
19 to testify. You heard testimony from -- you heard the proffer
20 from Mr. Binnall that he is and is eager to testify if the trial
21 is severed and, secondly, that the testimony is exculpatory. It
22 doesn't mean that it's not impeachable. The government may have
23 arguments to impeach Mr. Kesari, but that is exactly the
24 situation where the Eighth Circuit said in the Starr case that
25 it was error to not sever the case when they had a co-defendant